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UBER TECHNOLOGIES, INC.
and OTTOMOTTO LLC

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

WAYMO LLC,

Plaintiff,

v.

UBER TECHNOLOGIES, INC.,
OTTOMOTTO LLC; OTTO TRUCKING
LLC,

Defendants.

Case No. 3:17-cv-00939-WHA

**DEFENDANTS UBER
TECHNOLOGIES, INC. AND
OTTOMOTTO LLC'S MOTION FOR
RELIEF FROM NONDISPOSITIVE
PRETRIAL ORDER OF MAGISTRATE
JUDGE (DKT. 2128) AND
REQUEST FOR STAY OF ORDER**

Trial Date: December 4, 2017

Pursuant to Local Civil Rule 72-2, Defendants Uber Technologies, LLC and Ottomotto LLC (“Uber”) respectfully submit the following Objections to the Magistrate Judge’s Order Re: Discovery Disputes (Dkt. 2128) (“Order”) insofar as it holds that Uber waived work product protection over drafts of the due diligence report prepared by Stroz Friedberg LLC (“Stroz Report”) that were not in Uber’s possession.

Upon timely objection to a non-dispositive order of the Magistrate Judge, this Court must “modify or set aside any part of the order that is clearly erroneous or is contrary to law.” Fed. R. Civ. P. 72(a); *see also Osband v. Woodford*, 290 F.3d 1036, 1041 (9th Cir. 2002). Here, the Order erroneously concludes that Uber waived work product protection over drafts of the Stroz Report because the drafts were not on Uber’s privilege logs as of June 21, 2017. However, the Order acknowledges that Stroz never shared these drafts with Uber or Uber’s counsel. The Order is therefore erroneous because it purports to require Uber to log documents that Uber did not have. As Uber had never seen the drafts, it would have been impossible for Uber to prepare a log with the “bone-crushing” detail required by this Court. Accordingly, this Court should vacate the portion of the Order requiring production of the drafts and in the meantime stay that portion of the Order requiring production by tomorrow at noon.

RELEVANT BACKGROUND

Waymo previously served on Stroz a subpoena for documents from Stroz’s due diligence investigation. Uber (and others) moved to quash certain categories of the subpoena and Waymo moved to compel compliance. On June 21, 2017, the Magistrate Judge granted Waymo’s motion and denied Uber’s motion to quash (“Stroz Subpoena Order”) (Dkt. 670). Uber specifically objected to the Stroz Subpoena Order to the extent it could be read to imply that Uber had waived privilege over documents in Stroz’s possession that Uber had never seen and that therefore were not on Uber’s own privilege logs. (Dkt. 727 at 2-3.) This Court overruled Uber’s objection, but in so doing expressly ruled that the Stroz Subpoena Order had no “preclusive effect” on “new claims of privilege that Uber has had no opportunity to assert” because “the challenged part of [the] order did not contemplate, much less decide, the waiver issue Uber is now objecting over.” (Dkt. 745 at 3-4.) The Court’s orders concerning the production of the Stroz Report and

1 compliance with the Stroz subpoena were stayed pending the outcome of proceedings before the
2 Federal Circuit.

3 This motion for relief concerns drafts of the Stroz Report over which Uber previously
4 “had no opportunity to assert” privilege. It is undisputed that Uber and Uber’s counsel never
5 received drafts of the Stroz Report, which were in Stroz’s sole possession until August 2017.
6 (Dkt. 2018-4 ¶ 5; Dkt. 2018-1 ¶ 6; Dkt. 2020 ¶ 8.) While the appeal was pending before the
7 Federal Circuit, Stroz collected documents from its custodians and determined which were
8 responsive to Waymo’s subpoena. (10/23/17 Hr’g Tr. at 57:5-13.) In August 2017, Stroz made
9 available to Uber’s counsel over 10,000 documents Stroz had identified for proposed production.
10 Uber invested substantial resources to review the documents to identify any that are privileged
11 and served a privilege log just hours after Stroz transmitted its document production to Waymo
12 on September 16, 2017. (Dkt. 2020 ¶ 8; 10/23/17 Hr’g Tr. at 56:11-13.) The log included entries
13 for drafts of the Stroz Report – which Uber never received – that post-date the signing of the
14 merger agreement on April 11, 2016. Those drafts thus generally constitute protected attorney
15 work product, barring a waiver. (See Dkt. 731 at 3-4 (concluding that common interest privilege
16 exists as of the signing of the merger agreement on April 11, 2016); Dkt. 949 at 3-5 (overruling
17 Waymo’s objections to June 26, 2017 order finding a common interest as of April 11, 2016).)

18 On October 12, Waymo moved to compel production of the Stroz Report drafts, which are
19 in Stroz’s possession but over which Uber has asserted privilege and placed on a privilege log.
20 On October 27, the Magistrate Judge ruled that Uber waived its attorney work product privilege
21 in drafts of the Stroz Report because Uber should have placed any such drafts on a privilege log
22 by June 21, 2017, the date of the Stroz Subpoena Order. (Order at 4.)

23 **I. THE HOLDING THAT UBER WAIVED ITS ATTORNEY WORK PRODUCT**
24 **PRIVILEGE IN DRAFTS OF THE STROZ REPORT IS CLEARLY ERRONEOUS**

25 The Order’s conclusion that Uber should have logged drafts of the Stroz Report by June
26 21 is erroneous. (*Id.*) The Magistrate Judge found that Uber had not received copies of any
27 drafts of the Stroz Report (*id.*), yet still concluded that Uber should have prepared a log for
28 documents neither it nor its counsel had ever seen. That holding is fundamentally unfair.

1 **First**, the Order erroneously holds that because drafts of the Stroz Report were not on any
 2 of Uber’s privilege logs as of June 21, 2017 – the date of the Stroz Subpoena Order – then “under
 3 the [Stroz Subpoena] Order’s plain language, any privilege with respect to the drafts was
 4 waived.” (Order at 4.) While it is true that the Stroz Subpoena Order “held that Uber had waived
 5 the privilege for any responsive documents not on Uber’s privilege log” (*id.*), as this Court
 6 clarified, the Stroz Subpoena Order has no “preclusive effect” on “*new claims of privilege that*
 7 *Uber has had no opportunity to assert*” (Dkt. 745 at 3-4 (emphasis added)). As detailed below,
 8 Uber “had no opportunity to assert” privilege over drafts of the Stroz Report in June 2017.
 9 Therefore, Uber did not waive under the plain language of the Stroz Subpoena Order.

10 **Second**, the Order erroneously concludes that Uber *should have known* there were drafts
 11 and therefore logged them earlier. However, as of June 2017, it was far from obvious that drafts
 12 existed. For example, the Stroz Report could easily have existed on a document management
 13 platform at Stroz in the form of a final document with predecessor “versions” that were each
 14 replaced by the newest version. In that instance, there would be no drafts to produce or log. Uber
 15 did not know that personnel at Stroz exchanged drafts of the Stroz Report by email, such that
 16 drafts existed as email attachments. The Order’s conclusion that Uber should have known about
 17 or inquired about drafts of the Stroz Report because Stroz is Uber’s agent is also erroneous
 18 because there is no requirement in the Court’s standing order, or in Fed. R. Civ. P. 26(b)(5), that
 19 obligates a party to inquire with its agents about the existence of draft documents. Moreover,
 20 Waymo did not properly litigate whether Stroz was Uber’s agent in the underlying motion,
 21 instead only stating as much without any evidence. (Dkt. 1995 at 4.) The evidence shows Stroz
 22 was the joint agent of MoFo and OMM, not of Uber. (Dkt. 824-1 at Exs. A, F (Stroz engagement
 23 letters).)

24 Furthermore, without access to actual copies of the drafts, Uber could not have prepared a
 25 privilege log, certainly not one with the “bone-crushing detail” this Court demands. *See San*
 26 *Diego Unified Port Dist. v. Nat’l Union Fire Ins. Co. of Pittsburgh, PA*, No. 15cv1401-BEN-
 27 MDD, 2017 WL 3877730, at *3 (S.D. Cal. Sept. 5, 2017) (asserting privilege “is worthless
 28 without . . . a description of the documents . . .”). This Court has rejected “generalized claims of

1 privilege or work-product protection,” (Suppl. Order to Order Setting CMC ¶ 18), such that Uber
2 could not have included catchall boilerplate language referencing any drafts which may exist.
3 Instead, this Court requires privilege logs to identify the dates of the communications and all
4 authors/senders and recipients, as well as affirm that no unauthorized persons received the
5 communication. (*Id.*) Uber could not have provided *any* of that information until it obtained
6 access to and reviewed the documents, beginning in August 2017. The log Uber served on
7 September 17 for documents in Stroz’s possession has over 6,000 detailed entries, including
8 entries for drafts of the Stroz Report that set forth document dates and the names of the
9 authors/senders and recipients. (*See* Dkt. 1994-8 (9/16/17 Privilege Log prepared by Uber for
10 documents possessed by Stroz custodians) entries 3692, 3734, 3796, 3802, 3821.) Uber could
11 not have logged such information until Stroz first determined what documents were responsive
12 and then gave Uber’s counsel access to the documents.

13 ***Third***, the Order erroneously concludes that Uber’s assertion of privilege over the drafts is
14 untimely pursuant to this Court’s standing order. (Order at 5.) Initially, the Court’s standing
15 order seems to require the party who received a document request to provide a privilege log “at
16 the time of assertion” of the privilege for documents it is withholding from production. It does
17 not appear to apply to a party filing a motion to quash a subpoena served on a third party,
18 particularly as it pertains to documents in the third party’s sole possession. In any event, Uber did
19 provide a privilege log “at the time of assertion” of its privilege. Uber did not and was under no
20 obligation to serve written objections and responses to the Stroz subpoena. It asserted privilege
21 over the drafts after its counsel was afforded an opportunity to review the 10,000+ documents
22 Stroz made available for review in August 2017 and promptly furnished a privilege log. Contrary
23 to the Order’s conclusion, Uber did not wait “until after the Federal Circuit ruling” to inquire
24 whether drafts existed. (*Id.*) Uber acted diligently to furnish a log as soon as it determined Stroz
25 possessed drafts over which Uber was asserting privilege.

26 CONCLUSION

27 For the foregoing reasons, Uber requests that the Court vacate lines 7 through 28 on
28 page 4, and lines 1 through 5 on page 5 of the Order, including the order that Uber shall produce

1 any drafts of the Stroz Report by noon on Tuesday, October 31, 2017. Uber further requests that
2 the Court stay that portion of the Order until this objection is resolved.

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4 Dated: October 30, 2017

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6 By: /s/ Arturo J. González
ARTURO J. GONZÁLEZ

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